

# The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform

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## INTRODUCTION

Academics hate bad law. Filling the pages of journals such as this, we explore ways to improve the law. Standing before our classes, we seek to cultivate the critical faculties of our students, encouraging them to avoid blindly accepting poor reasoning and facile ideas. Outside of the academy, we pursue projects to create more effective and just laws. We laud events such as the appearance of the Model Penal Code.<sup>1</sup> Indeed, our fondness for law reform is so great that we even celebrate “anniversaries,” as with the upcoming fiftieth-anniversary of the Code.<sup>2</sup>

In all this, we expect the law’s progress, if labored, toward greater rationality and coherence. But is that right? Writing at the twenty-fifth anniversary of the Code, Paul Robinson posited two possible courses that post-Code law could follow.<sup>3</sup> By one view, “guided and spurred on by academics,” existing irrationalities and misconceived modifications would recede, as judges and legislatures became more familiar with Code law.<sup>4</sup>

Unfortunately, it seemed equally likely that “legislatures [would] continue in their misguided revisions for the political value that such activity can provide.”<sup>5</sup> Though not fully subscribing to one view or the other, this article will nevertheless examine a misguided

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<sup>1</sup> MODEL PENAL CODE (Official Draft and Revised Comments 1985) (Part I: General Provisions); MODEL PENAL CODE (Official Draft and Revised Comment 1980) (Part II: Definition of Specific Crimes).

<sup>2</sup> See, e.g., Symposium: *The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 519 (1988).

<sup>3</sup> Paul H. Robinson, *Four Predictions for the Criminal Law of 2043*, 19 RUTGERS L.J. 897 (1988).

<sup>4</sup> *Id.* at 907.

<sup>5</sup> *Id.*

revision of Illinois's natural and probable consequences doctrine and the extraordinary dynamic that led the Illinois courts and legislature to resurrect notions long thought by many to have been properly laid to rest. Thus, though the focus is on the activities in one state, this article is simply a case study in how various forces interact in the legal process of law reform. The subject matter is familiar nationally as are, unfortunately, the forces that led Illinois to codify its take on the notion that accomplices are liable for the "natural and probable" crimes committed by the primary actors.

I will look at several topics to make some sense of these developments. First, I will examine theories of accomplice liability and the fit of liability for natural and probable crimes within that framework. Next, I will examine the anomaly of that doctrine within a scheme based on the Model Penal Code. Since I am not alone in noticing this problem, I will also examine the work product of the two commissions most recently at work on these issues and the odd relationship between the courts and legislature in the development of the law. Finally, I will focus on the real-world consequences of recent misguided efforts from the perspective of the victims: those wrongly convicted because of this politically cavalier lawmaking.

## I. RATIONALES FOR ACCOMPLICE LIABILITY AND THE NATURAL AND PROBABLE DOCTRINE

Accomplice accountability is one of the most difficult topics to deal with properly, either pedagogically or through scholarly analysis. When people are part of multi-crime enterprises, it seems counterintuitive both for someone to be liable for the conduct of another *and* for her not to be. We feel people should accept responsibility for what they do and only for that, yet we also feel they should not so easily dissociate themselves from the wrongs of their associates. However, it is pointless to discuss the subset of accomplice accountability without first examining the larger concept.

The Model Penal Code, most generally, bases accountability on one's personal association with a criminal venture.<sup>6</sup> So long as someone has in some way participated (even ineffectually) in a crime with the intent to further the target crime, she is liable as if she had perpetrated the offense personally. But it was not always this way.

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<sup>6</sup> See MODEL PENAL CODE § 2.06 (Official Draft and Revised Comments 1985).

### A. Parties and Punishment

The Code drafters confronted a baroque maze of concepts and characters as they faced the task of law reform. First, the common law had created two categories of participants to multi-party crimes: principals and accessories.<sup>7</sup> In turn, each category was further subdivided into groups, generally based on either temporal or spatial features.

The most familiar participant was the “principal in the first degree,” most commonly thought of as the perpetrator. She both had the mental state for the crime and directly satisfied the act requirement, either personally or through another whom she manipulated.<sup>8</sup> Though we intuitively believe that she is most deserving of punishment, that notion is sometimes misguided.

The second member is the so-called “principal in the second degree.” That designation signifies some level of attenuation, as she need not be physically present for guilt to attach. Constructive presence will do. Moreover, she does not commit the actus reus of the offense but is guilty because of the assistance she has provided in the commission of the offense. Often, the assistance may consist of being a lookout, getaway driver, or the like. The potential forms of assistance are virtually limitless.

The next two types of actors vary from the principal in terms of their location or the timing of their assistance. The “accessory before the fact” by definition is not present, either constructively or actually, at the time of the commission of the crime. Rather, he has in some manner encouraged the principal in the first degree to commit the offense. Again, rather counter-intuitively, he could be the mastermind for the crime yet is frequently thought of as somewhat less blameworthy because of the spatial-temporal separation from the offense.

Finally, in the “accessory after the fact” we have an actor who simply tried to shield the main actors from detection. Oddly, she was still derivatively liable for the original crime, despite her late entrance

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<sup>7</sup> For a fuller development of this, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 468 (5th ed. 2009).

<sup>8</sup> Each discussion is based on DRESSLER, *supra* note 7. In this case, manipulation means that she used another to commit the act, often as a kind of innocent instrumentality.

upon the scene. Fortunately, nearly all jurisdictions now treat such conduct as a separate crime, one less serious than the original one.<sup>9</sup>

The Model Penal Code saw little utility in these distinctions. Breaking dramatically with prior law, the Code jettisoned the formerly vague notions of the bases for accountability, anchoring the statute in the now-familiar Code pattern of clearly defined acts and mental states. Indeed, the 1961 comments to the Illinois Code, which included many provisions of the Model Penal Code, “observed that liability under this subsection requires proof of an ‘intent to promote or facilitate . . . commission’ of the substantive offense.”<sup>10</sup>

But in rejecting these common law distinctions, the Model Penal Code and those jurisdictions that follow it also take a monolithic approach to derivative liability. So long as someone satisfies its culpability requirements, she is accountable for the conduct of others. It does not matter whether she effectively contributed to the crime, nor does it matter how trivial the assistance. Moreover, once accountability is established, guilt does not vary as between the primary actor and secondary parties. They are equally guilty, fit to be punished identically.

Professor George Fletcher has quite rightly lamented this heavy-handed approach, contrasting the American position most notably with that of Germany and countries influenced by Germanic jurisprudence.<sup>11</sup> Whereas all participants are treated monolithically in America, Fletcher noted the differentiated participation in criminal law systems elsewhere, especially that of Germany.

The American and German schemes of criminal liability share many similarities.<sup>12</sup> However, they also part ways in many areas, the greatest difference lying in a fundamental dimensional difference: whereas American law, especially in the common law era, focused on the temporal perspective—when the conduct took place—liability under German law turns on the presence or degree of *Tatherrschaft*—act dominion. Employing that notion, German law generated an approach that reflected “gradations in personal culpability among

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<sup>9</sup> *Id.* at 471.

<sup>10</sup> See 720 ILL. COMP. STAT. ANN. 5/5-2 cmt. (West 1993).

<sup>11</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 467 (1978) (critiquing the failure to recognize criminal law “as a body of ideas and practices with a reality deeper than the positive prescriptions of courts and legislatures”).

<sup>12</sup> Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT’L CRIM. JUST. 977, 985-987 (2007).

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various parties in crime.”<sup>13</sup> And, consistent with that, German law also generated gradations of punishment, presumably consistent with the actor’s controlled participation in the criminal enterprise.<sup>14</sup>

American law, whether guided by the Code or common law, treats principals and accessories identically. However, “the German Criminal Code draws a sharp line between the punishment of principals and solicitors on the one hand, and facilitators on the other.”<sup>15</sup> Whereas facilitators receive the benefit of mitigated sentences, solicitors are punished the same as principals.<sup>16</sup> The theory of the *Tatherrschaft* generated gradations in personal culpability based both on the extent to which the offense was the product of the actor’s “event directing will” and his dominance over the commission of the act in terms of causal contribution.<sup>17</sup> In turn, that was reflected in the sentencing scheme.<sup>18</sup>

#### B. Why Do We Punish the Non-perpetrator?

Intuitively, the German Code establishes a sensible relationship between parties and punishment. Something in us agrees that culpability varies based on one’s level of participation and that the level of punishment should be somehow commensurate. Unfortunately, that intuition does not yield a complete theory of accountability and punishment. Neither, however, do the reigning models in America.

Lost in detailed discussion<sup>19</sup> of the act and mental state adequate for accomplice liability is any recognition of the confused theory or theories supporting that liability in the first place. As I have said, we simultaneously embrace the notions of individual liability *and* joint liability based on association with a multi-party criminal enterprise. That cannot be.

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<sup>13</sup> *Id.* at 7.

<sup>14</sup> See Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBI. I] §§ 25-27. These and other references to the German Code can be found at <http://dejure.org/gesetze/StGB/>. That service also links to translations of the Code.

<sup>15</sup> Dubber, *supra* note 12, at 984.

<sup>16</sup> StGB section 49 covers this in great detail.

<sup>17</sup> Dubber, *supra* note 12, at 983.

<sup>18</sup> See StGB § 25-27; *see also* StGB § 29.

<sup>19</sup> Some of this detailed discussion follows in sections of this article.

Professor Joshua Dressler has examined these odd, conflicting views underlying accomplice liability.<sup>20</sup> Recognizing the dominance of the moral forfeiture and agency theories as supports for accomplice liability, Dressler rejected both.<sup>21</sup> Instead, focusing on the accomplice's relationship to the resultant social harm of the criminal conduct, he posited three potential candidates to replace the current confused and conflicting theories. Each has obvious relevance not only to the general topic of accomplice liability but also to the focus of this article: the justification, if any, for the natural and probable consequences rule.

First, Dressler suggested that accomplice liability might be based on one's substantial participation in the venture. Like the current theories, that theory also shares their deficiencies. Most notably, a substantial participation test would likely look to the time and effort someone expended on the criminal venture, rather than the efficacy of his efforts in producing the resultant harm. Thus, this theory would likely emphasize the accomplice's relationship to the criminal enterprise, at the expense of examining his role in causing the crime. That is inadequate, as the focus is misplaced, taking too great a note of the company the accomplice has kept and too little of what she *did* as a criminal actor.

Next, Dressler examined the "control or hegemony test," noting its similarity to the European views.<sup>22</sup> By that view, only those who control or assert hegemony over the other criminal actors should be treated as perpetrators and be subjected to the full punishment of the law. However, though that approach may work for some offenders, it could easily result in treating others too leniently. To demonstrate that possibility, Dressler again appeals to our intuitions.<sup>23</sup>

Suppose, for example, that a group is planning a bank robbery and the "brains" behind the scheme has sought out a master electrician to disable the alarm system. Suppose further that the electrician did so successfully, the robbery was a success, and she had no other

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<sup>20</sup> See Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91 (1985-86).

<sup>21</sup> *Id.* at 121 and following. The agency view simply reflected the view that the accomplice has authorized the perpetrator to act on her behalf and should accept the consequences of that accordingly. The moral forfeiture view was based on the fact that the accomplice had forfeited her personal identity by throwing in with others and was forced to accept the results. *Id.* at 115.

<sup>22</sup> *Id.* at 124.

<sup>23</sup> *Id.*

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relationship to that criminal venture, except for sharing in the spoils. Since she asserted no control over the venture, her level of involvement would dictate a lesser punishment under the hegemony test. Yet, under a sensible test, “the person willing to use special skills to commit crimes is especially suitable for punishment.”<sup>24</sup> Thus Dressler rejected this control test because it provided an incomplete theory on which accomplice liability would rest. I agree.

Finally, Dressler considered a causation test, under which he divided accomplices into “causal accomplices” and “noncausal accomplices.”<sup>25</sup> Here he had to prove the legitimacy of this test in the face of fundamental opposition from Sanford Kadish, who had argued that causation is effectively nonexistent in accomplice law. As Kadish said, “[W]hen we seek to determine the responsibility of one person for the volitional actions of another, the concept of cause is not available to determine the answer.”<sup>26</sup>

Yet, I believe Dressler successfully demonstrated that the issue, rather than being a moral one, was instead about burden of proof. The debate shifts then to how to structure evidentiary burdens to surmount that issue and introduce the appropriate bases for accomplice liability into criminal trials. The critical point, though, is that focusing on causation predicates guilt (and punishment) on the harm one actually causes, rather than on the harm caused by others.<sup>27</sup> In doing that, causation fortifies the notion that guilt is indeed personal. It also fortifies the notion that the basis for criminal guilt lies not in notions from the civil law of agency but remains firmly rooted in fundamental criminal notions of culpability and blameworthiness.

### C. Natural and Probable? Probably Neither

Superficially, the natural and probable consequences doctrine seems consistent with the “causal accomplices” and “noncausal accomplices” model, as it predicates guilt on the causal connection between the target offense and crimes that follow. However, in reality, the doctrine utterly departs from the causation model or any other model.<sup>28</sup> Rather

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* The latter group would receive lesser punishment.

<sup>26</sup> Sanford Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 335 (1985).

<sup>27</sup> See Dressler, *supra* note 20, at 125-26.

<sup>28</sup> Fletcher is probably right that this reveals an ambivalence about whether accountability is thus driven more by notions of wrongdoing or by civil notions from

than focusing on the causal contributions of the accomplice to the crime, the doctrine simply requires a weak nexus between the crimes themselves for liability to attach. Moreover, little is required to achieve a conviction on this basis or on its more specific “common design” version. Any perception that the subsequent crime was a foreseeable consequence of the first, no matter how indistinct, has virtually always sufficed.

This model violates any theory of criminal wrongdoing and responsibility. Liability based on foreseeability of crimes strains such theory to the breaking point, as it dispenses not only with the requirement of intent but also seemingly with *mens rea* entirely. Worse, it also dispenses with the requirement of any personal act of any kind, predicating liability solely on one’s status as an accomplice to the first offense. Finally, it virtually eliminates the need for the very causation of which it seems so enamored.

The Model Penal Code rejects this natural and probable doctrine, as do most commentators. The commentary to the Code labels the position “incongruous and unjust.”<sup>29</sup> Other commentators criticize its inversion of the usual culpability requirements. Dressler, for example, points out that this doctrine permits conviction based on negligence, though the target offense may well call for a higher mental state.<sup>30</sup> He would be right if the doctrine truly required proof of negligence and a jury instruction on that. However, as I have indicated, the so-called doctrine in practice degenerates into a kind of causation-based requirement, with no proof of causation required.

Despite such issues, as Dressler also points out, at common law and in most jurisdictions an accomplice to the target offense is also liable for the “natural and probable consequences of the crime aided and abetted.”<sup>31</sup> In Illinois, the term used for this is “common design.” Apparently reaching back to 1854, the common design rule had been applied by Illinois courts until the re-codification of criminal law in

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the law of agency, as I have previously discussed. As Fletcher said, whereas the language we often use “indicates that we regard persons who commit crimes as autonomous and hegemonous over their acts . . . our doctrines of vicarious liability and liability beyond the scope of the agreement suggest that sometimes we regard the actor-behind-the-scenes as the dominant figure.” FLETCHER, *supra* note 11, at 664.

<sup>29</sup> MODEL PENAL CODE § 2.06 cmt. at 312 n.42 (Official Draft and Revised Comments 1980).

<sup>30</sup> See DRESSLER, *supra* note 7, at 484; see also WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 551 (2d ed. 2010).

<sup>31</sup> DRESSLER, *supra* note 7, at 483 (citation omitted).

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1961.<sup>32</sup> Then, two years *prior to* the official publication of the Model Penal Code, Illinois adopted many sections of the Code as they then appeared, including its provision on accountability.<sup>33</sup>

Courts, and indeed all players in the criminal justice system, would be expected to adapt haltingly to such new, substantially changed approaches to liability, with the usual stumbles to be anticipated. What was not as easily predicted, however, was the apparent hostility with which these provisions would be received. While courts are typically reluctant to embrace new policies, many were unusually virulent in their reaction to these changes.

## II. NATURAL AND PROBABLE: COURTS AND CODE LAW

American law reveals an uneasy relationship between courts and legislatures. Legal Process advocates have long touted the clear advantage legislatures maintain over courts in the formulation of policy.<sup>34</sup> Indeed, criminal law, with its enormous policy challenges, obviously benefits from legislative oversight. Legislatures are equipped to formulate policy in that reasoned, deliberative mode championed by legal scholars Hart and Sacks. However, courts have often responded with a marked aversion to legislation, treating those efforts as unwelcome incursions into the lawmaking process.

In learned circles, debate has raged over the formal superiority of legislation to judicial lawmaking. Law professors and legislation experts William Eskridge and Philip Frickey noted this, commenting that so-called “legisprudes” considered “statutes functionally inferior to judicial decision, which were treated as the primary source of legal reasoning and policy guidance.”<sup>35</sup> Despite these tussles, scholars have finally declared ours an age of statutes, proclaiming, “[T]he classical

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<sup>32</sup> James R. Thompson et al., *The Illinois Criminal Code of 2009: Providing Clarity in the Law*, 41 J. MARSHALL L. REV. 815, 824 (2008).

<sup>33</sup> A person is accountable for the conduct of another if “either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense.” 720 ILL. COMP. STAT. ANN. 5/5-2 (West 1993).

<sup>34</sup> See generally HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William Eskridge, Jr. & Philip Frickey eds., 1994).

<sup>35</sup> WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 587 (4th ed. 2007).

vision of the formal primacy but functional inferiority of statutes has become outmoded in the past century, the ‘age of statutes.’”<sup>36</sup> Though one would hope that change in vision would gain convincing sway where it matters most—with courts—this has certainly not been the case with common design.

Illinois courts have consistently resisted the new Code from its inception. The victorious battles waged in erudite circles remain hollow victories for the victims of judicial overreaching. Nowhere is that more evident than in one of the earliest cases decided after the Code’s enactment.

Rudy Kessler was quite literally in the wrong place at the wrong time—with the wrong people. While he was carousing with two acquaintances, one mentioned that he had to “put his hands on \$1800.”<sup>37</sup> Kessler mentioned that he had worked at a bar in Rockford, Illinois, but that the receipts never reached that level.<sup>38</sup> Nevertheless, the three then proceeded to the bar, and after closing, while Kessler sat in the car, the other two entered the bar unarmed.

A scuffle ensued in the bar between the two men and the owner, during which one co-defendant found a pistol in the bar and shot the owner in the neck. After they fled to the car and raced away, the other co-defendant shot toward the police several times with the seized pistol before the police forced the car off the road. The two co-defendants fled the car while Kessler remained, initially claiming to have been a hitchhiker. The three were eventually convicted of burglary and two counts of attempted murder.<sup>39</sup>

In the inevitable appeal, the appellate court rather grudgingly conceded the correctness of Kessler’s statutory argument. To the court, “imputed or implied intent [was] clearly outside the contemplation of the statute on accountability.”<sup>40</sup> Yet the court then discussed, almost wistfully, the natural and probable rule in other states, noting that it represented a “more reasonable approach to the law of accountability *but one which [the court could not] adopt in contravention of the language in the Code.*”<sup>41</sup> Unfortunately, the Supreme Court did not feel similarly constrained.

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<sup>36</sup> *Id.* at 588.

<sup>37</sup> *People v. Kessler*, 315 N.E.2d 29, 30 (Ill. 1974).

<sup>38</sup> *Id.* See the appellate opinion for that detail, 296 N.E.2d 631, 633 (Ill. App. Ct. 1973).

<sup>39</sup> 315 N.E.2d 29.

<sup>40</sup> 296 N.E.2d at 636.

<sup>41</sup> *Id.* at 636 n.3.

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The Supreme Court, while ostensibly following the Illinois Code, virtually ignored it. Indeed, the State's arguments even revealed a powerful common law bias. Rather than arguing the plain meaning of the Code, the State maintained that the appellate court had "disregarded the plain meaning of legal doctrines applied by this court and by the highest courts of other jurisdictions."<sup>42</sup> Of course, one such legal doctrine was that of natural and probable consequences. The court's ensuing stare nostalgia, covering such matters as the misdeeds of nineteenth-century watermelon thieves, missed no opportunity to exalt common law over the recently enacted Code.<sup>43</sup> That approach, and its obsession with ancient doctrine over current statutes, vividly revealed a profound judicial bias.

Poor Rudy Kessler. Convicted on two counts of attempted murder, he had been sentenced to five to fifteen years on each count.<sup>44</sup> He now saw his appellate court reprieve unravel in the state's highest court.

The court next resisted the argument that common design had not survived the passage of the Code, even though the Code and its comments had explicitly laid it to rest. In support of this doctrine, the court cited to cases on felony murder.<sup>45</sup> Naturally, felony murder provides its built-in principle of liability, not relying on separate notions of common design. However, this litigation further re-enforced common design, now rather sadly becoming a case simply cited in support of the doctrine's viability as settled law.

But *Kessler* was decided during the early years of the Illinois Code. Moreover, judges are no better trained than anyone else in the interpretation of statutes. One would also expect that the common law bias was stronger in 1974 than it is today. That is not the case.

For instance, the Illinois Supreme Court most recently addressed common design in the context of sentence enhancement. Jorge Rodriguez was an accomplice to a murder committed by the use of a firearm.<sup>46</sup> He was not the shooter, and he did not possess—or possibly even know of—the firearm. Under an Illinois statute, if first-degree murder was committed while one was armed with a firearm, an additional fifteen-year penalty had to be imposed by the court.

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<sup>42</sup> 315 N.E.2d at 32.

<sup>43</sup> *Id.*

<sup>44</sup> *See* 296 N.E.2d at 633.

<sup>45</sup> 315 N.E.2d at 33.

<sup>46</sup> *People v. Rodriguez*, 891 N.E.2d 854 (Ill. 2008).

Obviously, the provision on sentence enhancement existed both to deter people from carrying guns and to punish those who were armed with firearms during the commission of murder.<sup>47</sup> In principle, the blanket application of this provision to an unarmed accomplice would, then, be unwarranted, as the provision is aimed at the individual who was the actual perpetrator and also actually possessed the weapon. Indeed, deterrence, here through the vehicle of the sentence enhancement provision, works that way. But common design seems particularly inappropriate in this setting, as it has at most an attenuated relationship to deterrence. However, the court disagreed.

By this point, *stare decisis* had become particularly potent when applied to statutory interpretation.<sup>48</sup> First, for several decades, the term “conduct,” as used in the criminal code, had been interpreted by this court to include *all* conduct, not just that of the target offense.<sup>49</sup> The court has subscribed to this erroneous interpretation of the Illinois accountability statute for nearly four decades. Second, common design itself creates this open-ended liability, and the court declared, “[O]ur accountability statute does not deviate from the common law rule of common design.”<sup>50</sup> Thus, citation to case law obviates the need for analysis, as this is now settled doctrine. And, it is extended to an ill-suited situation, one in which the individual is the target of the sentencing statute, and that would certainly exclude an unwitting accomplice.

Now, it would be unworthy to simply heap criticism on this court. Like many courts before and after it throughout this country, the Illinois Supreme Court simply perpetuated a common law position in the face of its inconsistent code. Indeed, though code law has not always been violated, that may be because some states have clung to this misguided doctrine too strongly to even permit code reform.

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<sup>47</sup> The statute spoke in terms of being “armed,” not in necessarily using the firearm to kill. Unified Code of Corrections, 730 ILL. COMP. STAT. ANN. 5/5-8-1(d)(i) (West 1993). Other subsections of this scheme increased the sentence enhancement to twenty or twenty-five years based on whether the individual “personally discharged” a firearm or “personally discharged” it causing great bodily harm or death. § 5/5-8-1(d)(iii).

<sup>48</sup> See generally William Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (particularly interesting piece on the strength of statutory precedents).

<sup>49</sup> Under both the Illinois Code and Model Penal Code, someone is liable for the “conduct” of another if he is an accomplice of such other person in the commission of the offense. See, e.g., MODEL PENAL CODE § 2.06(3).

<sup>50</sup> *Rodriguez*, 891 N.E.2d at 856 (citing again to felony murder cases as well as nineteenth century case law).

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Illinois is, then, not a rogue state, but it represents a perceptible trend in favor of holding people liable, despite their meager contributions to criminal enterprises.

California, for example, applies this natural and probable consequences doctrine very broadly. Not limiting liability to subsequent crimes that resemble the target offense, the state has extended liability to some matters on the most threadbare of theories. Thus, in *People v. Nguyen*,<sup>51</sup> up to nine men were involved in the robbery of two businesses in Sacramento, a tanning salon and a relaxation spa.<sup>52</sup> During these robberies, some of the men committed sex offenses, and their accomplices were convicted of those offenses.

The California statute includes as principals all those persons “concerned in the commission of a crime,” regardless of the level of participation.<sup>53</sup> Extending that liability to collateral crimes, California takes the view that one’s liability is not governed by any fixed standard. Indeed, liability is “neither legally abstract nor personally subjective. It is case specific . . . .”<sup>54</sup> A troubling formulation, this permits ad hoc decision making.

In *Nguyen*, the court noted that in “hostage-type robberies in isolated locations, sexual abuse of victims is all too common.”<sup>55</sup> This, in conjunction with the “sexual aura” of the businesses robbed, led the court to easily affirm the convictions for the sex offenses.<sup>56</sup> Many similar cases fill the reporters of California as well as most other states, and the doctrine holds substantial sway in this country.<sup>57</sup>

Indeed, at times this doctrine is even applied or referred to when contrary to state statutes or governing decisional law.<sup>58</sup> Apparently, courts in Georgia, Louisiana, Ohio, and Texas apply it despite its obvious inconsistency with other provisions of state law.<sup>59</sup> Unfortunately, to that list, I may unhappily add the State of Illinois.

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<sup>51</sup> 26 Cal. Rptr. 2d 323 (Ct. App. 1993).

<sup>52</sup> *Id.* at 327-28.

<sup>53</sup> CAL. PENAL CODE § 31 (West 2009).

<sup>54</sup> 26 Cal. Rptr. 2d at 334.

<sup>55</sup> *Id.* at 332.

<sup>56</sup> *Id.* at 332.

<sup>57</sup> *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007) (stating that relatively few jurisdictions have expressly rejected the natural and probable consequences doctrine).

<sup>58</sup> Brief for the Respondent at 17, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007) (No. 05-1629).

<sup>59</sup> *Id.*

These are the kind of misguided efforts of which Robinson and others have spoken. But as this is a legal process I am discussing, others play a role in trying to get things right. These include legislatures, academics, and people who serve on law reform commissions. Before turning to those efforts, it would be useful to show why the Illinois courts and others embracing this doctrine are so wrong on both law and policy.

### III. WHY IS COMMON DESIGN SUCH A BAD IDEA, ANYWAY?

Common design violates the basic Model Penal Code requirement that guilt rests on a notion of blameworthiness requiring intentional wrongdoing. It would seem to be justly criticized, then, as it founders on this key Code requirement for guilt. Naturally, its defenders would shrug off this criticism on policy grounds, though they could not overcome the statutory argument that it cannot co-exist with other Code provisions. But that statutory incongruity runs even deeper.

A code represents policy choices made through mechanisms of representational government. Having adopted the Model Penal Code position, the Illinois legislature concluded that a party's guilt for another's conduct is based on her intentional participation *in* that conduct. Common design signals a radical departure from that position, in that liability for subsequent crimes has no such requirement. This is a dramatic break with legal orthodoxy, one occurring outside the legislative process.

Even more chilling is common design's wholesale rejection of the role of *mens rea* in guilt. Like the Model Penal Code, Illinois scrupulously requires personal culpability for all offenses except those involving absolute liability and expresses a strong bias against that notion. It does this through two enormously important sections.

First, the provision on "absolute liability" limits such offenses to those not involving incarceration or serious fines, unless the offense "clearly indicates a legislative purpose to impose absolute liability for the conduct described."<sup>60</sup> Common design utterly undermines this as to all possible subsequent offenses. Through it, the accomplice is treated much more harshly than the principal wrongdoer; she is absolutely liable for these subsequent offenses regardless of the requirements for guilt they ordinarily bear. Thus, whereas the State

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<sup>60</sup> 720 ILL. COMP. STAT. ANN. 5/4-9 (West 1993).

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had to prove that Kessler's co-defendants had the intent to kill the bar owner and state trooper, it had no such burden for Kessler. That is quite mad.

Moreover, it turns all predicates for guilt entirely on their heads. The principal offender is more intimately connected to the wrongdoing and is arguably the graver offender than the accomplice.<sup>61</sup> Yet she enjoys a presumption of innocence not shared by the accomplice. The accomplice is convictable by the metaphorical device of common design; regardless of whether any such design (or agreement) has been proved, so long as crimes one and two seem related, the accomplice is automatically convicted.

But again, common design apologists will insist that one should be judged by the company one keeps. Whether that should be the case, it flatly violates the mens rea provisions of both codes under discussion.

Like the Model Penal Code, the Illinois Code provides for the interpretation of statutes that are silent on mens rea. Accordingly, if the statute in question provides no mental state as to an element of an offense, guilt may be proven based on intent, knowledge, or recklessness.<sup>62</sup> This requirement prohibits the application of common design.

If Dressler and others are right,<sup>63</sup> common design allows the conviction of an accomplice based on nothing more than negligence. In fact, I believe it requires *no mental state at all*. It is senseless to have an open-ended basis for accomplice liability, one in which the accomplice is exposed to conviction for all manner of offenses, based on negligence. Worse, such a doctrine is statutorily barred. By the terms of the Illinois Code, the prosecution must prove at the very least that the accomplice acted recklessly as to the subsequent offense. Thus, as it stands, this doctrine completely subverts the Code, and thus cannot survive its enactment. Sadly, in practice, it has.

#### IV. UPDATING STATUTES: THE ROLE OF LAW COMMISSIONS

Courts must not ignore statutes that change the common law, as that clearly violates the separation of governmental powers. That is

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<sup>61</sup> See materials, *supra*, on Fletcher and the nuanced approach by German-influenced codes.

<sup>62</sup> § 5/4-3.

<sup>63</sup> See DRESSLER, *supra* note 7, at 484.

what has happened with common design. However, at some point, not only must courts bow to the superior role of legislatures in law creation, but legislatures themselves must consider whether their work is still viable and functional.

Guido Calabresi recognized this dynamic, commenting that statutes sometimes, “like all laws, became middle-aged.”<sup>64</sup> We rarely consider statutes time bound, and they cannot remain vital indefinitely.<sup>65</sup> As times change, and as legal needs change, codes must be updated. Unfortunately, as Calabresi also notes, “[G]etting a statute enacted is much easier than getting it revised.”<sup>66</sup>

The Illinois Code section on accountability was not necessarily showing any undue wear, sagging, or unsightly wrinkles. However, the Code had swollen from its original 72 pages to over 1,200. With the incremental changes and tweaking that take place over four decades alone, a Code will suffer from inconsistencies and many other types of problems requiring correction. The need for comprehensive review was clear.

Accordingly, in 2000, then-Governor George Ryan issued an executive order creating the Illinois Criminal Code Rewrite and Reform Commission (“CCRRC”).<sup>67</sup> Governor Ryan appointed more than thirty members to the commission including Professor Paul Robinson, who agreed to act as the Commission’s Reporter.<sup>68</sup> As Robinson wrote, “[T]he time was ripe to take a step back and conduct a panoramic review of the Illinois Criminal Code.”<sup>69</sup> Unguided by any national initiative such as a “Model Penal Code Second,” Illinois acted courageously in undertaking this move alone.

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<sup>64</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 6 (1982).

<sup>65</sup> Indeed, Alex Aleinikoff created the lively metaphors of the archeological search for meaning as opposed to the nautical one, one recognizing that statutes, much in the vein of Dworkin’s chain novel, are christened and set sail to many ports over time. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988).

<sup>66</sup> CALABRESI, *supra* note 64, at 6.

<sup>67</sup> Exec. Order No. 9 (2000) (creating the Illinois Criminal Code Rewrite and Reform Commission).

<sup>68</sup> Wayne R. LaFave and Andrew Leipold accepted appointments as special counsel. Interestingly, Paul J. Pomeranke, an English professor served as a “plain English” drafting consultant.

<sup>69</sup> ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION, FINAL REPORT, at v (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1523384](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523384) [hereinafter REPORT].

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Robinson was particularly concerned with culpability language because of the obvious centrality of that requirement. Especially troubling was the courts' occasional neglect of the Code's disapproval of absolute liability and requirement that culpability exist for each element of an offense unless absolute liability was clearly intended.<sup>70</sup> Indeed, Robinson explicitly focused on common design as a prime example of such misguided neglect, recommending the "elimination of the 'common design' rule for complicity liability."<sup>71</sup> Noting many of the problems mentioned here, Robinson's comments provided a legislative history clearly rejecting common design.

Not content to leave it there, however, the CCRRC sought to improve on the Model Penal Code, explicitly establishing the culpability requirements for accomplices. The final draft established complicity when: "Having the culpability required by the offense, he intentionally aids, solicits, or conspires with such other person in the planning of commission of the offense."<sup>72</sup>

Robinson inserted his commentary within many provisions of the proposed code, including the section on accountability. Apparently, a split remained within the CCRRC, with several dissenting members wanting to retain common design. The accompanying comments reveal the rift within the commission membership:

**Issue:** Should the Proposed Code incorporate the common-law "common-design" rule, which imposes complicity liability for all crimes in furtherance of a common criminal design or agreement on all parties to the agreement, whether or not they foresaw, knew about, or ratified those crimes?

**Yes:** The common-design rule makes it easier to convict an offender's confederates without a complex and difficult evidentiary showing of culpability.

**No:** The common-design rule inappropriately allows for liability based on negligence, or even in the absence of culpability as to the offense. The original 1961 Code sought to eliminate the common-design rule, which was then resurrected in case law. To the extent such a complicity rule is considered necessary or desirable in the homicide context, it can be addressed directly

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<sup>70</sup> *Id.* at liv.

<sup>71</sup> *Id.* at lvi-lviii.

<sup>72</sup> *Id.* § 301(1)(b), at 19.

through a felony-murder rule.

**Reporter:** Strongly recommends against expanding liability beyond the current complicity provision.<sup>73</sup>

Robinson's language reveals how strongly he felt; in his view and mine, nothing justifies common design, other than the desire to convict easily. As I have said repeatedly, that justification violates the most basic notions of culpability embraced by the Code.

On January 1, 2003, CCRRC chair Matthew Bettenhausen submitted the final report to Governor Ryan.<sup>74</sup> Consisting of 626 pages, it dramatically rewrote substantive criminal law without vaulting its own policy notions over those of the predecessor law.<sup>75</sup> The Commission's work spanned more than two years, consuming vast amounts of time and representing literally thousands of hours of work by Robinson. Governor Ryan accepted the report, thanking the Commission for a work that "addresses the many significant changes in our society over the last forty years and ensures that the laws of Illinois will provide a cohesive and fair approach to crime and punishment in the years to come."<sup>76</sup>

At that point, Calabresi's skepticism would seem laid to rest. Not only had a middle-aged statute been substantially revised, but it was a criminal code, something that we might think would prove most politically resistant to change. Moreover, it had received the blessing of the state's chief executive. But that does not capture the complete dynamic at work in this attempt at law reform.

Even after it was finished, some members of the Commission were unhappy with the scope of the reforms. The adopted drafting process represented a distinct compromise within CCRRC. Some members wanted essentially a new code,<sup>77</sup> whereas others wanted to adopt a more "redline" position.<sup>78</sup> The compromise yielded a more limited rewrite. However, apparently that still left some members

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<sup>73</sup> *Id.*

<sup>74</sup> *See id.* at vii (letter from Matthew Bettenhausen to George Ryan dated January 1, 2003).

<sup>75</sup> Though the report was voluminous, it substantially shortened the Code itself.

<sup>76</sup> REPORT, *supra* note 69, at vii.

<sup>77</sup> Vice Chairman Bensinger wanted to present "a new Code, drawing on the case law and legislative intent of the existing Code but not necessarily following the same exact format or language." Letter from Peter Bensinger to Matthew Bettenhausen, Chairman, CCRRC (Nov. 8, 2000) (on file with Commission staff).

<sup>78</sup> REPORT, *supra* note 69, at xiv.

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dissatisfied. Commissioner and DuPage County State's Attorney Joseph Birkett resisted any major rewrite, instead favoring "an examination of current laws and suggesting appropriate changes in the arrangement of the Code so it is simplified."<sup>79</sup>

Further complicating matters, Governor Ryan announced in August 2001 that he would not seek reelection in 2002. Thus, the Commission felt it necessary to complete the drafting process prior to January 2003, when Governor Ryan's term would expire.<sup>80</sup> Thus, we have the letter exchange between the CCRRC chair and the governor dated January 1, 2003. That confluence of events doomed the CCRRC. Governor Ryan was indicted and eventually convicted of racketeering, fraud, and extortion. The scandal limited his ability to advance criminal law reform. Worse, those within the Commission who objected to the project's conclusions apparently blocked whatever momentum the project carried.

My personal correspondence with Paul Robinson verifies this.<sup>81</sup> Robinson watched disheartened as Ryan was powerless to advance the report legislatively and those with different criminal law philosophies impeded whatever chances the draft had to make it before the legislature. Indeed, the Commission disbanded, its work never amounting to more than an interesting publication on SSRN.<sup>82</sup>

#### A. One Commission Ends, and Another Takes Its Place

But the tale continues, as did criminal law reform in Illinois. Apparently spurred by the work of CCRRC, a group interested in law reform banded together to form a new commission called Criminal Law Edit, Alignment and Reform (CLEAR). Sharing seemingly similar objectives with CCRRC, it consisted of judges, prosecutors, and public defenders, as well as others active in criminal law. It was co-chaired by former Governor and United States Attorney James R. Thomson, and its only carryover member from CCRRC was commissioner Birkett.<sup>83</sup>

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<sup>79</sup> Letter from Joseph E. Birkett to Paul H. Robinson (Oct. 24, 2000) (on file with Commission staff).

<sup>80</sup> REPORT, *supra* note 69, at xv.

<sup>81</sup> E-mail correspondence between Michael Heyman and Paul H. Robinson, commencing May 6, 2010 (on file with author).

<sup>82</sup> REPORT, *supra* note 69.

<sup>83</sup> See generally CLEAR Initiative, <http://www.clearinitiative.org> (last visited July 16, 2010).

Like its predecessor, CLEAR sought to revise this aging code, seeking to eliminate “redundancies, inconsistencies and confusing language.”<sup>84</sup> CLEAR lamented that “a Code that once made clear distinctions between right and wrong and concisely explained the penalties for transgression now confounds even experienced layers and judges.”<sup>85</sup> CLEAR began working in 2005, and it presented its work to the legislature and governor of the state in several pieces. Its work included a substantial change to the existing section on accountability, one completely contrary to that proposed by CCRRC.

The CLEAR Commission published many of its findings in a law journal. The findings included a rather lengthy commentary, dealing with its changes to twenty-two articles of the state Code.<sup>86</sup> Many of its changes were quite minor. However, CLEAR proposed a substantial change to the existing law on accountability. Its revision codified the Illinois version of natural and probable, common design.

Never referring to the CCRRC report, this group first noted that common design “has been applied by the Illinois Supreme Court for over one hundred and fifty years.”<sup>87</sup> Thus, though it conceded the absence of common design from the 1961 Illinois Code, CLEAR noted that courts had interpreted that Code as including that view.<sup>88</sup> These comments and others demonstrated no grasp whatsoever of the relationship between the Code and this common law doctrine. This was particularly evident in the group’s view of the Code’s culpability requirements.

CLEAR justified the codification of this view by asserting that “the ‘common design rule’ is used to determine whether a defendant has the requisite intent” contained in the Code.<sup>89</sup> That simply cannot be. By CLEAR’s view, common design is an expedient that imputes the *acts* of a principal party to any accomplices. Indeed, the commentary quoted favorably from the language of *Kessler*: “Where two or more persons engage in a common criminal design or agreement, any *acts* in furtherance thereof committed by one party are considered to be the *acts* of all parties to the common design and all

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> James R. Thompson, Gino DiVito, Peter G. Baroni, Kathy Saltmarsh & Daniel Mayerfield, *The Illinois Criminal Code of 2009: Providing Clarity in the Law*, 41 J. MARSHALL L. REV. 815 (2008).

<sup>87</sup> *Id.* at 823.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

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are equally responsible for the consequences of such further *acts*.”<sup>90</sup> CLEAR’s commentary contends that common design provides a mechanism for determining whether a defendant “is accountable for another’s criminal acts.”<sup>91</sup> Accordingly, it is very hard to take this commentary seriously, as it does not even attempt to distinguish between acts and mental state. Moreover, the commentary supports its view by providing a rather slovenly paraphrase of *Pinkerton v. United States*, which established liability for any crimes committed to advance the conspiracy so long as the participants are still part of the conspiracy when committed.<sup>92</sup>

Unfortunately, the state legislature did take CLEAR’s poorly reasoned suggestion very seriously. The CLEAR group sent its revision of the accountability statute to the state legislature, which adopted the language I just quoted *verbatim*.

As a result of that legislation, the state Code now contains this common design nonsense. The common design provision sits side-by-side with the previous Code language, which essentially reproduced the Model Penal Code.<sup>93</sup> Aside from the defects already discussed here, this new legislation creates two enormous problems. First, the Code now contains two distinct and incompatible positions on the basis for accomplice liability. Prosecutors will inevitably rely on common design to convict those involved in multi-crime enterprises since it is a much easier standard for them to meet. That will be so, regardless of the accused’s involvement in those subsequent crimes. That is a complete, and unfortunate, victory for common design.

Second, the content of the Code—the language lifted slavishly from *Kessler*—makes no sense, mocking the notion of statutory clarity and the principle of legality. Providing a virtual study in how *not* to draft a Code, the CLEAR group relied on language never intended for inclusion in a statute. It completely avoided any mention of act or mental state, undermining a major objective code reform.<sup>94</sup>

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<sup>90</sup> *Id.* (quoting *People v. Kessler*, 315 N.E.2d 29, 32 (Ill. 1974)).

<sup>91</sup> *Id.* at 824.

<sup>92</sup> *Pinkerton v. United States*, 328 U.S. 640 (1946) (failing to distinguish between conspiracy and complicity and creating dangerous precedent from analogies drawn to commercial law).

<sup>93</sup> See ILL. COMP. STAT. ANN. 5/5-2 (West 1993).

<sup>94</sup> “An essential provision of a criminal code is the Principle of Legality, which requires that penal law should give notice to the citizenry as to what conduct is proscribed as well as provide an ascertainable standard of guilt to those who have enforcement responsibilities, such as police, prosecutors, judges and juries.” John

Beyond that, by stating that the acts in furtherance “are considered to be” the acts of all parties, the commission used language defying legal recognition. Presumably, this means that the acts of the principal offenders are imputed to accomplices, though it remains unclear. In addition, this sub-section provides no mechanism for determining just when a “common criminal design or agreement” exists, and thus it provides no guidance for determining the material elements of the offense that must be proved by the prosecution. Based on precedent, apparently nothing has to be proved.

Indeed, though common design has now been codified, little will change legally. Functionally, prosecutors will rely on the doctrine for charges and convictions more frequently. The doctrine is so familiar to all participants that few will realize that *the State has now codified a doctrine that conclusively presumes guilt*.

The state pattern jury instruction already covers this doctrine, closely tracking the Model Penal Code and providing the conditions under which an accomplice is accountable for the conduct of another. This is acceptable. However, the instruction then enshrines this mistaken interpretation of “conduct” from this skein of common design cases. According to the instruction, “the word ‘conduct’ includes any criminal act done in furtherance of the planned and intended act.”<sup>95</sup> Moreover, the mental state has been proved if it has been shown that “the defendant shared a criminal intent of the principal *or evidence [exists] that there was a common criminal design.*”<sup>96</sup> The blow to the principle of legality is clear and complete. Citizens are placed on notice that they are subject to conviction for virtually any subsequent offense of a criminal cohort. The message: be terribly careful about the company you keep.

#### B. A Possible Escape from this Conclusive Presumption of Guilt

The common design doctrine has survived all forms of legal process. It migrated unaltered from ancient state law into the present. It survived the scrutiny of a law reform commission, indeed receiving

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Decker, *The Mission of the Criminal Law Edit, Alignment, and Reform Commission (CLEAR): An Introductory Commentary*, 41 J. MARSHALL L. REV. 611, 657-58 (2008). Professor Decker was the Special Advisor to the CLEAR Initiative.

<sup>95</sup> Illinois Supreme Court Committee on Pattern Jury Instructions in Criminal Cases, *Illinois Pattern Jury Instructions—Criminal* § 5.03 (4th ed. Supp. 2000) 2008-2009.

<sup>96</sup> *Id.* The term “common design” is nowhere defined by state jury instructions.

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its blessing. Then, it achieved code status, having passed through the state legislature and received the governor's signature. But nowhere in those travels has it been properly exposed to the light of day.

Mounting a successful challenge to this doctrine may require the most futile-sounding gesture: a request that a trial court disavow it. In a properly chosen case, defense counsel representing the "common-design defendant" must do what defense counsel invariably do, seek a directed verdict of acquittal at the close of the State's case. The argument is clear: the State has provided no evidence whatsoever of the client's participation in the subsequent crime, neither acts nor mental state.

The prosecutor will parry, claiming that "common design" obviates the need to prove those elements. The replies to that are entirely Code-based. Criminal guilt requires proof of at least recklessness, where no mental state is included, as is obviously the case here. Moreover, "a material element of every offense is a voluntary act."<sup>97</sup> Thus, the failure to adduce any evidence of either should be fatal to the State's case. There cannot be a conclusive presumption of guilt for subsequent offenses simply based on the defendant's participation in the target crime.

Inertia would almost certainly cause the court to deny the motion. It would likely cite to the long presence of common design within state law and its recent codification after the CLEAR initiative. But now the issues would be properly framed for an appeal, attracting the attention of numerous amici. Assuming the issues were narrowly and precisely framed, success on appeal could well follow. As a statutory matter, this common design amendment irreconcilably conflicts with the remainder of the state scheme on accountability and absolute liability crimes.

However, because of the constitutional dimension to the argument, even defeat in the state system could be followed by a federal court victory on the grounds that the Due Process Clause prohibits a conclusive presumption of guilt. Explaining the operation of presumptions generally, Professor Wayne LaFave examined their "slippery" nature but noted that they operate to "call for uniform treatment with respect to their effect as proof of other facts."<sup>98</sup>

Here, the involvement in the target offense serves as the "fact"

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<sup>97</sup> 720 ILL. COMP. STAT. ANN. 5/4-1 (West 1993).

<sup>98</sup> WAYNE R. LAFAVE, CRIMINAL LAW 159 (5th ed. 2010) (quoting C. MCCORMICK, EVIDENCE § 342 (J. Strong ed., 4th ed. 1999)).

from which the jury would conclude guilt for the subsequent offense or offenses. Thus, though common design does not neatly fit within the concept of a presumption, it operates even more powerfully. Rather than simply providing an evidentiary mechanism for bridging the gap from one point to another, it provides an automatic mechanism for conviction.

This conflicts with the seminal presumption in criminal law, the innocence of the accused.<sup>99</sup> As Dressler said, “[R]ebutable mandatory presumptions are unconstitutional when the presumed fact is an element of the crime charged.”<sup>100</sup> Here, the doctrine operates to presume *both* the act and mental state, the cornerstones of culpability. Thus, common design clearly violates the constitutional mandates expounded in *Sandstrom* and its progeny.<sup>101</sup> Victory on constitutional grounds should be a virtual certainty, were that option explored.

In any event, exposing this doctrine to this form of scrutiny and notoriety might also rouse the legislature to action, this time in a focused setting. Admittedly, challenging individual criminal convictions is not the ideal way to accomplish law reform. But all other avenues are now well trod and have proven unavailing. So, at times this form of direct challenge to a law’s legitimacy is all that is left.

### C. The Costs of Misguided Law Revision

Sadly, Paul Robinson foresaw this result after his group was discharged, commenting to me that it was “exactly what you should expect from that crowd. It is nothing to be surprised about.”<sup>102</sup> But predictable does not mean acceptable. Bad law is just too costly in so many ways.

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<sup>99</sup> The presumption conflicts with “the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.” *Morissette v. United States*, 342 U.S. 246, 275 (1952).

<sup>100</sup> DRESSLER, *supra* note 7, at 80.

<sup>101</sup> *Sandstrom v. Montana*, 442 U.S. 510 (1979). Indeed, as Dressler went on to say, “True irrebuttable presumptions are hard to find in the criminal law,” and they are “unconstitutional for the same reasons that mandatory rebuttable ones are impermissible.” DRESSLER, *supra* note 7, at 81. In common design, we have both.

<sup>102</sup> E-mail from Paul H. Robinson to Michael Heyman (May 6, 2010) (on file with author). Moreover, Paul’s bitterness was evident. Having spent thousands of hours working on the CCRRC project, he saw that go down the drain in favor of something “much less ambitious, and something more prosecutor friendly.” E-mail from Paul H. Robinson to Michael Heyman (May 7, 2010) (on file with author).

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Rudy Kessler was, as mentioned, sentenced on two counts of attempted murder in which he did not remotely participate. Each count carried a sentence of five to fifteen years. Had he only been convicted of burglary, the crime for which he was guilty as an accomplice, he would have likely served only a couple of years. As it was, he may have to serve decades based on this monstrous doctrine of common design. Along with a loss of freedom, Kessler would have lost whatever else he had: family, friends, and other life pursuits.

*Kessler* is not alone. This doctrine (and its generic form nationally, natural and probable) has resulted in untold convictions of innocent people.<sup>103</sup> These people are guilty of some criminal behavior, and they may not be model citizens. However, any sense of animus felt toward common design defendants should not result in their conviction for all offenses committed by their confederates. Yet that may well be the animating sentiment of the CLEAR commission.

Naturally, this does not include the more ineffable, less measurable costs to civil society from this gross misuse of the criminal sanction. No one benefits. Its imposition represents a mindless, rather brutal treatment of an underclass of those who, while they have violated our norms, do not deserve that level of condemnation.

## CONCLUSION

I have written recently about American Exceptionalism, a concept usually describing our national disdain for international organizations and transnational norms.<sup>104</sup> While writing that piece, however, I wondered whether the more appropriate concept would be Americans' Exceptionalism. Something in our national ethos, some strain of thought somehow embedded in our *zeitgeist*, seems to reject certain progressive norms in favor of those we perceive as more

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<sup>103</sup> I have discussed only two cases within state law, as they are illustrative. However, the doctrine is a staple of state law, resulting in innumerable reported cases in which defendants filed unsuccessful appeals, such as *Kessler's*, and obviously many more in which they have silently gone to prison. Moreover, the codification of this doctrine may change prosecutorial conduct, resulting in even greater use of this notion.

<sup>104</sup> Michael G. Heyman, *The Time has Come for the United States to Ratify the Convention on the Elimination of All Forms of Discrimination Against Women*, 9 WASH. U. GLOBAL STUD. L. REV. 195 (2010). See generally the writings of Judith Resnik, who has written exhaustively and brilliantly in the area. See, e.g., Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).

traditional. This may be the explanation for the continued vitality of the natural and probable doctrine and its substantial acceptance in this country. This may also explain our national fetish with felony murder, long after its abandonment in England.<sup>105</sup>

But Judy Resnik has also written of a different and somehow parallel thrust to this Exceptionalism. She argued for American Exceptionalism in a “beacon of liberty mode,” in which we justly take pride in our leadership role in human rights.<sup>106</sup> The ultimate rejection of this common design doctrine requires the proper invocation of that notion.

Psychologist and academic Jonathan Haidt may have provided the missing piece to achieve that objective. Writing on the communication gap between the two major political parties, he noted that when “Democrats try to explain away these positions using pop psychology they err, they alienate, and they earn the label ‘elitist.’ But how can Democrats learn to see—let alone respect—a moral order they regard as narrow-minded, racist, and dumb?”<sup>107</sup>

Borrowing from the teachings of Emile Durkheim, Haidt recognized that all societies need a “tending and caring” that requires recognition of a rich diversity of moral perspectives. By this view, the dominant Democratic view reflects a pervasive anomie (normlessness); in elevating the individual over all social structures, society then lurches about with a kind of moral incompleteness. Lacking or somewhat dismissing respect for authority and what he calls an “appreciation of purity and sanctity,”<sup>108</sup> that group simply thinks its counterpart does not get it.

That may explain the kind of sentiment that results in statutes that seek to protect the public good from those too quick to join criminal enterprises. The “law and order” sentiment motivating this thinking is obvious but must be dealt with rather than dismissed as hopelessly misguided. That dialogue must confront not only the doctrinal problems discussed here but also the other concerns that drive these divergent views. And, somehow, this dialogue must result in a legal change that may appear politically costly to its proponents.

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<sup>105</sup> England abolished the doctrine in 1957. The Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1.

<sup>106</sup> Resnik, *supra* note 104, at 1657.

<sup>107</sup> Jonathan Haidt, *What Makes People Vote Republican?*, EDGE (Sept. 9, 2008), [http://www.edge.org/3rd\\_culture/haidt08/haidt08\\_index.html](http://www.edge.org/3rd_culture/haidt08/haidt08_index.html).

<sup>108</sup> *Id.*

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Skepticism about law revision, then, seems especially understandable here. The State has long embraced this dangerous doctrine and has now codified it. Reform, such as it was, has seemingly run its course. But perhaps the first model proposed by Paul Robinson can be achieved. Perhaps, spurred by academic commentary, lawmakers will eventually recognize the unjustness of this doctrine and eliminate it. I certainly hope so.